Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of Joint Application by BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc. for Provision of In-Region, InterLATA Services in Florida and Tennessee	WC Docket No. 02-307

OPPOSITION COMMENTS OF KMC TELECOM III LLC

Genevieve Morelli
Andrew M. Klein
Jennifer M. Kashatus
KELLEY DRYE & WARREN LLP
1200 19th Street, N.W.
Washington, D.C. 20036
(202) 955-9600
Attorneys for KMC Telecom III

Dated: October 10, 2002

SUMMARY

The Commission must deny BellSouth's application to provide in-region, interLATA services in the states of Florida and Tennessee, because BellSouth does not satisfy several checklist items. As a result of BellSouth's noncompliance with these checklist items, BellSouth is thwarting the efforts of local competitors, such as KMC Telecom III LLC ("KMC"), attempting to compete within BellSouth's territory. KMC and other competitive local exchange carriers ("CLECs") continually are battling BellSouth's intransigence on critical interconnection issues, and are suffering from deficient and discriminatory loop performance to the detriment of competition in the marketplace.

In both Florida and Tennessee, BellSouth has failed to demonstrate compliance – nor can it – with checklist item one (Interconnection), checklist item four (Access to Unbundled Loops), and checklist item thirteen (Reciprocal Compensation). KMC's experience demonstrates that, contrary to BellSouth's assertion, BellSouth has failed to provide interconnection and reciprocal compensation in accordance with the requirements set forth in sections 251(c) and 252(d) of the Communications Act of 1934, as amended (the "Act"), as incorporated into the competitive checklist. Specifically, regardless of its obligations under the Act or in interconnection agreements, BellSouth repeatedly and persistently fails to remit appropriate compensation to CLECs for the transport and termination of traffic.

BellSouth also has not demonstrated compliance with checklist item four – access to unbundled loops. Indeed, the data upon which BellSouth relies to support its position that it has satisfied checklist item four actually demonstrate "patterns of systemic performance disparities." For example, BellSouth assigns loops in a discriminatory manner, and provides substandard installation to its CLEC customers.

BellSouth's conduct directly affects competition in the marketplace in both Florida and Tennessee. The Commission must deny BellSouth's application for section 271 authority in Florida and Tennessee, because BellSouth is not in compliance with the competitive checklist. Unless the Commission requires BellSouth to be in full compliance with the competitive checklist prior to granting BellSouth's section 271 application, it is inevitable that BellSouth's already substandard performance will deteriorate, because BellSouth no longer will have any incentive (such as long distance approval) to perform in accordance with its obligations under the Act, the Commission's rules and orders, and its interconnection agreements. As a result, competition throughout Florida and Tennessee will be stymied to the detriment not only of CLECs such as KMC, but also to the public interest.

TABLE OF CONTENTS

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of Joint Application by BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc. for Provision of In-Region, InterLATA Services in Florida and Tennessee

OPPOSITION COMMENTS OF KMC TELECOM III LLC

KMC Telecom III LLC ("KMC"), by its attorneys, submits these comments in opposition to the Joint Application of BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc., (collectively "BellSouth") for authority to provide in-region, interLATA services in the States of Florida and Tennessee, pursuant to section 271 of the Communications Act of 1934, as amended (the "Act").[1] KMC is precisely the type of facilities-based competitive local exchange carrier ("CLEC") that this Commission has identified as being central to the Commission's vision of the competitive landscape.[2] KMC is a leading facilities-

[1] 47 U.S.C. § 271; *see Comments Requested on the Joint Application by BellSouth Corporation for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Services in the States of Florida and Tennessee*, Public Notice, WC Docket No. 02-307, DA 02-2357 (Sept. 20, 2002).

[2] The Commission has an "ongoing commitment to the promotion of facilities-based competition" which "should focus, in particular, on both so-called 'full facilities-based' competition and competition from newer entrants who supplement their own facilities with network elements leased from the incumbent." *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, *Deployment of Wireline Services Offering Advanced Telecommunications Capability,* CC Docket No. 98-147, and *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996,*

. . . .*Continued*

based competitor against BellSouth in both Florida and Tennessee.[3] Through its operations center located in the heart of BellSouth's territory, KMC deploys high-speed, high-capacity fiber optic networks for the provision of various services to business customers, including local and long distance voice service, high-speed Internet access, data capabilities, and unified bundles of service.

In both Florida and Tennessee, BellSouth is not complying with several critical checklist items, and, as a direct result, is hindering facilities-based competition to the detriment of carriers and consumers. KMC has experienced repeated and persistent problems – and has endured improper and discriminatory performance – in interconnecting with BellSouth and in attempting to obtain access to loops.[4] In particular, BellSouth's conduct causes it to fail to satisfy the following required checklist items set forth in section 271(c)(2)(B) of the Act:

(i) – interconnection;

(iv) – access to unbundled loops; and

(xiii) – reciprocal compensation.

Indeed, BellSouth's own performance data, particularly with regard to unbundled loops, demonstrate that KMC's experience is not unique, but instead that BellSouth provides substandard performance to competitors.

CC Docket 96-98, Separate Statement of Chairman Michael K. Powell on Notice of Proposed Rulemaking, 16 FCC Rcd 22781, 22837 (2001) ("*Triennial Review NPRM*"); *see also id*. at 22786, ¶ 9.

3 *See, e.g.,* Affidavit of BellSouth witness Elizabeth Stockdale, Exhibits ES-5 and ES-6 ("*BellSouth Stockdale Affidavit*").

4 KMC also competes against other incumbent carriers in Florida and Tennessee, including Sprint and Verizon. KMC therefore is able to provide the Commission with this evaluation using this comparative experience in those states.

Due to BellSouth's clear lack of compliance with the competitive checklist and its anticompetitive tactics, the Commission must deny BellSouth's application. As much as the Commission may have excused BellSouth "performance" in its prior section reviews, there is simply no way for the Commission to find that BellSouth is eligible for interLATA entry in either Florida or Tennessee.[5] The Commission must require that BellSouth demonstrate actual compliance with the competitive checklist *before* granting BellSouth's application. In prior years, the Commission has emphasized that

> a BOC's promises of *future* performance to address particular concerns raised by commenters have no probative value in demonstrating its *present* compliance with the requirements of section 271. Paper promises do not, and cannot, satisfy a BOC's burden of poof. In order to gain in-region, interLATA entry, a BOC must support its application with actual evidence demonstrating its present compliance with the statutory conditions for entry, instead of prospective evidence that is contingent on future behavior.[6]

This standard previously has served the Commission and the industry well, by ensuring that ILECs did not obtain section 271 authority until they had satisfied the competitive checklist, and thus, opened up their markets to competition.[7] The Commission's recent acceptance of RBOC promises of future remedial action to address deficient, non-compliant performance cannot continue. It is violative of the Act, and thwarts competition. If the Commission removes the long distance incentive, BellSouth will not have any incentive to comply with its obligations

---

[5] BellSouth's performance in Florida in meeting the relevant standards (retail analogue or fixed benchmark) is the absolute worst in comparison with all other BellSouth states, and Tennessee follows it in second or third place). Affidavit of BellSouth witness Alphonso Varner at 5 ("*BellSouth Varner Affidavit*").

[6] *Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services in Michigan*, 12 FCC Rcd 20543, 20573, ¶ 55 (1997) ("*Ameritech Michigan 271 Order*") (emphasis in original).

[7] *See, e.g., id*. (denying Ameritech's application for 271 authority in Michigan).

under the Act, and, thus, likely will provide CLECs with even worse performance than they currently receive, to the detriment of competition.

I. BELLSOUTH IS FAILING TO COMPENSATE CARRIERS FOR THE TERMINATION OF LOCAL TRAFFIC AS REQUIRED BY CHECKLIST ITEMS I AND XIII

BellSouth's repeated and persistent failure to provide interconnection and reciprocal compensation to competing carriers are evidence that BellSouth has not satisfied – and cannot satisfy – checklist items one and thirteen. BellSouth cannot comply with checklist items one and thirteen merely by entering into interconnection agreements with CLECs that incorporate – on their face – the items set forth in these checklist requirements. Instead, to satisfy these (and other) checklist items, BellSouth must be able to demonstrate conclusively that it actually has carried out the obligations to which it agreed to be bound in its interconnection agreements with CLECs.[8] BellSouth simply cannot make this showing.

Pursuant to checklist item one, BellSouth must demonstrate that it provides "[i]nterconnection in accordance with the requirements of sections 251(c)(2) and 252(d)(1)."[9] To satisfy the statutory obligation set forth in section 251(c)(2) of the Act, BellSouth must "provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network . . . for the transmission and routing of telephone exchange service and exchange access."[10] In reviewing other applications for section

---

8 *See, e.g., Ameritech Michigan 271 Order*, 12 FCC Rcd at 20601-02, ¶ 110 (stating that an ILEC "provides" a checklist item only if it "actually furnishes the item. . ."). Since BellSouth has not actually furnished the items in accordance with the Agreement, it has not provided the items, and, thus, does not satisfy checklist items one and thirteen.

9 47 U.S.C. § 271(c)(2)(B)(i).

10 47 U.S.C. § 251(c)(2)(A).

271 authority, the Commission has emphasized that to meet checklist item one, an ILEC must satisfy each of the three elements set forth in section 251(c)(2) of the Act,[11] which require an ILEC to actually provide the following: (1) interconnection "at any technically feasible point within [its] network,"[12] (2) interconnection that is "at least equal in quality to that provided by the local exchange carrier to itself,"[13] and (3) interconnection "on, rates, terms, and conditions that are just, reasonable, and nondiscriminatory, *in accordance with the terms of the agreement* and the requirements of [section 251] and section 252."[14] Thus, as the plain language of section 251(c)(2) indicates, BellSouth cannot demonstrate that it has complied with the obligations set forth in section 251(c)(2) – and thus its checklist item one obligation – merely by showing that it has entered into interconnection agreements with CLECs. Instead, BellSouth must demonstrate that it *actually provides* interconnection in *accordance with the terms of its agreements*; BellSouth cannot make this showing, and, therefore, has not satisfied checklist item one.[15]

BellSouth has failed to remit appropriate compensation to KMC for the transport and termination of traffic. The Act imposes this obligation on BellSouth, and the obligation is incorporated into the parties' current and prior interconnection agreements. KMC and BellSouth entered into a multi-state interconnection agreement in October 2000; prior to that agreement, KMC and BellSouth had operated pursuant to the terms of the BellSouth/MCImetro agreement,

---

11 *See Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of New York*, 15 FCC Rcd 3953, 3977-78, ¶ 63 (1999) ("*New York 271 Order*").

12 *Id.;* 47 U.S.C. § 251(c)(2)(B).

13 *New York 271 Order*, 15 FCC Rcd at 3977-78, ¶ 63; 47 U.S.C. § 251(c)(2)(C).

14 *New York 271 Order*, 15 FCC Rcd at 3977-78, ¶ 63; 47 U.S.C. § 251(c)(2)(D) (emphasis added).

which KMC had adopted. There can be no doubt that pursuant to both the current multi-state interconnection agreement and the terms of the BellSouth/MCImetro agreements in Florida and Tennessee, BellSouth had – and still has – an obligation to compensate KMC for the transport and termination of traffic. In each month since June 2000, KMC has invoiced BellSouth for the services it provided. Yet, in each and every month during this period, BellSouth has failed to compensate KMC for a significant portion of the traffic that KMC transported and terminated. Despite its unequivocal obligation, BellSouth repeatedly and intentionally has refused to remit compensation and now owes KMC over $6,000,000.[16] BellSouth's conduct demonstrates its practice to withhold reciprocal compensation regardless of the underlying agreement or the Act.

KMC is cognizant of the Commission's reluctance to consider interpretive disputes during the section 271 application process; KMC raises this issue because, despite what BellSouth now likely will assert, this matter is *not* an interpretive dispute.[17] It is, rather, a simple failure to comply with BellSouth's contractual obligations. By its actions, BellSouth has intentionally acted in contravention of the Act and the terms of its interconnection agreements in Florida and Tennessee. It thus has failed to satisfy the specific requirements of sections

---

15 *See supra* note 8.

16 This amount covers eight BellSouth states; BellSouth owes the largest dollar amounts to KMC for transport and termination services in the states of Florida and Tennessee.

17 Since this issue pre-dates the parties' current interconnection agreement, BellSouth had an obligation to seek any clarification of the parties' rights and responsibilities that it believed was necessary when the parties negotiated the current agreement – not now, and certainly not by asserting that an interpretive dispute exists in this forum when such an action clearly would serve BellSouth's interests. KMC had refrained from bringing this issue to the Commission's attention previously, because it hoped that the bilateral negotiations would have led to BellSouth's compliance. Since BellSouth instead has continued to shirk its checklist obligations, KMC is compelled to alert the Commission to the existence of this checklist violation.

251(c)(2)(D) and 271(c)(2)(B)(i) of the Act, and, therefore, cannot be considered to be in compliance with checklist item one.

Similarly, BellSouth's failure and refusal to compensate KMC for the services that KMC provided to BellSouth, as described above, mandates that the Commission conclude that BellSouth has not complied with checklist item thirteen. Pursuant to checklist item thirteen, BellSouth must enter into reciprocal compensation arrangements with carriers in accordance with the requirements of section 252(d)(2).[18] Section 252(d)(2) provides, *inter alia*, that to be just and reasonable, the terms and conditions of reciprocal compensation must "provide for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination. . . ."[19]

The Commission previously has explained that an ILEC does not demonstrate compliance with checklist item thirteen merely by entering into an agreement for the payment of mutual reciprocal compensation; instead, an ILEC also must compensate carriers as set forth in such agreements.[20] BellSouth agrees, and conveniently recites this standard in its Joint Application: "[t]o comply with this item, BellSouth must show that it '(1) has in place reciprocal compensation arrangements in accordance with section 252(d)(2), and (2) is making all required

---

18 47 U.S.C. § 271(b)(2)(B)(xiii).

19 47 U.S.C. § 252(d)(2)(A)(i).

20 *See Application by SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance, Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in Texas*, 15 FCC Rcd 18354, 18538-39, ¶ 379 (2000) (*"Texas 271 Order"*) (stating that SWBT demonstrates compliance with checklist item thirteen because it "(1) has in place reciprocal compensation arrangements in accordance with section 252(d)(2), and (2) is making all required payments in a timely fashion.").

payments in a timely fashion.'"[21] BellSouth, however, cannot make this showing, because it has not compensated KMC for the transport and termination of compensable traffic. Thus, BellSouth clearly has failed to provide for the mutual recovery of traffic costs, in violation of section 252(d), and therefore is unable to demonstrate compliance with checklist item thirteen. Since the Act by its own terms, and under the Commission's interpretation of the same, requires BellSouth to honor the terms of its interconnection agreements, BellSouth must compensate KMC and similarly situated carriers for the costs they have incurred – and continue to occur – before the Commission can approve BellSouth's section 271 application.

II. BELLSOUTH IS NOT PROVIDING ACCESS TO LOOPS IN ACCORDANCE WITH THE CHECKLIST

BellSouth's remarkably poor performance in providing access to loops continues unabated. Despite the contortions that the Commission has gone through in prior section 271 reviews to conclude that BellSouth satisfied checklist item four, KMC again will demonstrate – this time in the context of Florida and Tennessee – the extent of BellSouth's poor performance. As KMC explained in its comments opposing the prior BellSouth section 271 application, the high capacity loop segment is, practically speaking, the *only* segment that matters to KMC. BellSouth's systemic performance disparities cause competitive harm to KMC and similarly situated carriers. Unless the Commission forces BellSouth to improve its high capacity loop performance by denying this application, facilities-based carriers such as KMC will not have any meaningful opportunity to compete and eventually may be forced to exit the market.

---

[21] *BellSouth Joint Application* at 112 (*citing Texas 271 Order,* 15 FCC Rcd at 18538-39, ¶ 379).

While the Commission – and the Commissioners – repeatedly professes the importance of facilities-based competition,[22] the Commission's recent orders continually devalue the items upon which facilities-based competitors rely. In the two recent BellSouth section 271 orders,[23] for example, the Commission stated that poor (*i.e.*, discriminatory) high capacity loop performance "did not warrant a finding of checklist noncompliance" since high capacity loops represent a relatively small percentage of all loops ordered.[24] High capacity loops are aptly named, in that they carry large amounts of traffic on a single circuit, and, thus, by their nature, replace multiple lower-grade circuits. As a result, there always will be lower volumes of high capacity loops in comparison to the millions of voice grade circuits. Perhaps, then, it is appropriate to address high capacity loop performance in terms of voice-grade equivalents such that the significance of these loops is evident. Since a DS-1 is 24 voice grade lines, performance for each DS-1 must be multiplied by 24, since a DS-3 represents 672 voice grade lines, each DS-3 circuit must be likewise multiplied by 672.[25]

---

22 *See, e.g., Triennial Review NPRM*, Separate Statement of Commissioner Kevin J. Martin ("Enabling CLECs to gain meaningful access to essential facilities controlled by ILECs thus remains crucial to promoting facilities-based competition.").

23 *See Joint Application by BellSouth Corporation for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Services in the States of Alabama, Kentucky, Mississippi, North Carolina and South Carolina*, Memorandum Opinion and Order, WC Docket No. 02-150 (rel. Sept. 18, 2002) ("*BellSouth Multi-State Order"*), *Joint Application by BellSouth Corporation for Provision of In-Region, InterLATA Services in Georgia and Louisiana*, Memorandum Opinion and Order, CC Docket No. 02-35 (rel. May 15, 2002) ("*BellSouth GA/LA II Order"*).

24 *BellSouth Multi-State Order* at ¶ 243 & n. 947; *BellSouth GA/LA II Order* at ¶ 619.

25 There is a reasonable basis for this calculation. If KMC were to sign up a small business with 15 voice lines and one data line, for example, it would provide its own voice and data offering (or at least attempt to do so) over a leased DS-1 that it would connect to its own network. Therefore, one missed appointment or outage on that one DS-1 would affect the equivalent of at least 16 DS-0s.

RBOCs are required to provide loop performance sufficient to afford competitors with a "meaningful opportunity to compete;"[26] BellSouth has failed to meet this standard in either Florida or Tennessee. Indeed, once again, BellSouth's performance demonstrates "patterns of systemic performance disparities that have resulted in competitive harm,"[27] which the Commission must not overlook. BellSouth's own performance data demonstrate that its performance providing service to CLECs is worse in Florida than in any other BellSouth state. Specifically, BellSouth's overall performance in meeting the appropriate metric standard – either the retail analog or benchmark – for all performance measurements combined,[28] is significantly worse in Florida than in any other state throughout the BellSouth region.[29] Furthermore, an examination of specific metrics critical to the competitive checklist reveals that BellSouth's performance in Florida providing, for example, access to UNEs, is even worse than its overall performance meeting all performance measurements combined.[30]

In both Florida and Tennessee, BellSouth's loop performance fails the Commission's well-established standards for access to loops, thus illustrating noncompliance with checklist item four, and, therefore, the Commission must deny BellSouth's section 271

---

[26] *New York 271 Order*, 15 FCC Rcd at 4098; ¶ 279, *Texas 271* Order, 15 FCC Rcd at 18482, ¶ 251 *Georgia/Louisiana II Order* at ¶ 219.

[27] *Georgia/Louisiana II Order* at ¶ 219.

[28] BellSouth did not include FOC & Reject Completeness – Multiple Responses, and LNP Disconnect Timeliness in its calculation. *See BellSouth Varner Affidavit* at 5.

[29] *BellSouth Varner Affidavit* at 5 (stating that in Florida BellSouth met only 83% of the various performance metrics for CLECs). Tennessee is not far behind, being roughly second or third worst. *Id.* at 85.

[30] *Id.* at 85 (stating that, in the context of UNEs, BellSouth only met the criteria with regard to only 84% of the metrics, and only in two out of three months examined). With regard to the third month, it is unclear precisely how poor BellSouth's performance was.

application. BellSouth's has failed to satisfy checklist item four due to its discriminatory loop assignment procedures, poor provisioning performance, and horrible maintenance and repair. To compound BellSouth's already egregious performance, BellSouth continues to *actively* block access to customers. Although this issue now has been raised in all prior BellSouth section 271 proceedings this year, the problem as it relates to facilities-based competitors remains unaddressed.

A. BellSouth Assigns Loop Facilities in a Discriminatory Fashion

BellSouth continues to prevent competitor access to loop facilities, which prevents service from being provisioned to customers that attempt to switch to KMC. In such cases, BellSouth designates the CLEC order as "held, pending facility" and sends the competitor a notice that the order is in jeopardy of not being completed. BellSouth's own data reveal the magnitude of the problem and demonstrate just how discriminatory its actual, real-world facility-assignment practices truly are:

Percent of Orders Placed in Jeopardy Status
Digital Loops DS-1 and Above
August, 2002
(All CLEC Orders, Mechanized)[31]

State	BellSouth	CLECs
Florida	10%	**67%**
Tennessee	29%	**73%**

In the *BellSouth Multi-State Order*, the Commission excused similarly discriminatory performance, based on an incredible BellSouth assertion that some of the loops

[31] *See* BellSouth Monthly State Summary, Metric B.2.5.19, Percent Jeopardies – Mechanized.

included in the retail analogue run between BellSouth central offices.[32] Significantly, in the BellSouth Varner Reply Affidavit, which the Commission cited, BellSouth, however, did not even attempt to provide a UNE-Loop to Retail-Loop, apples-to-apples comparison; instead, BellSouth relied on vague assertions about the nature of "significant number(s)" of circuits. Perhaps even more important, is the fact that, when asked about the same facility-shortage problem on the record just months earlier, BellSouth witness Varner gave a vastly different explanation.[33] Clearly, there is no valid excuse for this disparate performance. Even if BellSouth's systems and procedures are "designed to ensure" nondiscriminatory loop assignment as its witnesses assert,[34] it is obvious that either the systems and procedures are insufficient or BellSouth personnel simply are not following them.[35]

The Florida metric definitions appear to have eliminated the metric-based excuse propounded by BellSouth in the prior application, at least, since the BellSouth SQM Analog/Benchmark for UNE Digital Loop >= DS-1 in Florida is "Retail Digital Loop" >= DS-1.[36] Since a "Loop" clearly is a circuit "from the central office to the customer's premises,"[37] the

---

32 *BellSouth Multi-State Order* at ¶ 247 (*citing* Varner Reply Affidavit).

33 In testimony before the NCUC, BellSouth witness Varner asserted that the CLECs were simply providing high capacity service in different geographic regions than was BellSouth. NCUC Docket No. P-55, Sub 1022, Tr. Vol. 9 at 56 ("percent jeopardies is very sensitive to geography") and 60-61 ("And typically, what we found every case in those percent jeopardies is that the issue is a difference in geography that we're serving.").

34 *See BellSouth Multi-State Proceeding, BellSouth witness Milner Reply Affidavit* at ¶ 10.

35 The Commission may recall that the New York PSC uncovered this problem when reviewing the Bell Atlantic New York 271 application. There, however, the NY PSC required proof that the central office technicians were actually following the procedures (for hot cuts) before recommending that Bell Atlantic be permitted to offer interLATA service.

36 *BellSouth Varner Affidavit,* Exhibit PM-19, at 3-5 (BellSouth Service Quality Measurement Plan (SQM), Florida Performance Metrics version 2.0).

above-stated 67-to-10 ratio can be relied upon as an accurate reflection of BellSouth's discriminatory performance.

The Commission must require BellSouth to address this problem now, *before* approving BellSouth's application; otherwise BellSouth performance could decline even further – as it has done in Georgia post-approval. As illustrated below, BellSouth performance in Georgia and Louisiana after section 271 approval dropped dramatically in comparison with the performance data that the Commission reviewed.

Percent of Orders Placed in Jeopardy Status
Digital Loops DS-1 and Above
(All CLEC Orders, Mechanized)[38]

Georgia	**BellSouth**	**CLECs**
January 2002	3%	**43%**
February 2002	4%	**56%**
March 2002	6%	**59%**
August 2002	13%	**73%**

BellSouth certainly will claim, as it has in the past, that its pending facility performance has less of an impact than one would suspect based on the highly skewed ratios noted above. BellSouth's discrimination, as illustrated above, directly impedes competition; the Commission cannot continue to ignore this conduct.

BellSouth actually has highlighted one of the problems that results from placing CLEC orders in jeopardy status. "When a jeopardy is issued, some of the time that would otherwise be allocated for testing and turn up of the circuit may be lost in trying to resolve the

[37] 47 U.S.C. § 271(c)(2)(B)(iv).

jeopardy."[39] "The tradeoff to meet the customer due date may increase the potential for error."[40] Thus, the greater the incidence of jeopardies, the more likely the circuit will fail once installed – a fact confirmed by the significantly higher trouble rates for CLEC loop installs noted below.[41]

Despite the shortcomings in BellSouth's procedures noted above, in attempting to meet its burden of proof BellSouth relies on the mere existence of procedures. Here too, BellSouth fails. BellSouth admits, for example, that it has not investigated whether its technicians were actually *following* the prescribed procedures. BellSouth also acknowledges that compliance may vary by region and can affect both new installs as well as repair performance, and that the company is not aware of the corrective measures undertaken by other RBOCs to ensure compliance with checklist item four.[42] BellSouth simply has failed to adduce appropriate evidence on these subjects.

Finally, BellSouth also admits that its discriminatory practices for facility assignment cause missed appointments. In both states, "the majority of these missed appointments [for digital loops] were caused by facility issues."[43] Although a major obstacle in

---

38 *See* BellSouth Monthly State Summary, Metric B.2.5.19, Percent Jeopardies – Mechanized.

39 *Georgia/Louisiana II* proceeding, CC Docket 02-35, BellSouth *ex parte* filing at 3 (Apr. 17, 2002).

40 *Id.*

41 Indicating trouble rates on CLEC circuits within first 30 days of install are 150 to 540% higher than they are for analogous BellSouth retail circuits (*see, e.g.,* metric B.2.19.19.1.1, DS-1 and higher loops).

42 *See, e.g.*, Cross examination of BellSouth witnesses Ainsworth and Heartley before the South Carolina Public Service Commission, July 2001, Docket 2001-209-C.

43 *BellSouth Joint Application* at 92.

their own right, these facility issues also lead to other problematic results, discussed below. These persistent problems compel a finding that BellSouth ahs not satisfied checklist item four.

B. Installation and Outage Problems Plague BellSouth UNE Loops

When BellSouth decides to allocate facilities to CLECs and finally provides UNE loops, outage problems immediately arise. Due to the time "lost in trying to resolve the jeopardy" condition that CLEC orders encounter the majority of the time,[44] the poor quality of the facilities assigned, or the supposedly inadvertent mistakes made by the BellSouth technicians, CLEC loop installs encounter trouble with much greater frequency than do BellSouth retail circuits. With respect to provisioning troubles within 30 days, "BellSouth has not met the benchmarks in Florida,"[45] and provided even worse performance in Tennessee.

Percent of Provisioning Troubles within 30 days August, 2002 (CLEC Aggregate Data)[46]		
UNE Digital Loops Below DS-1		
State	**BellSouth**	**CLECs**
Florida	4.8%	**8.3%**
Tennessee	5.1%	**5.9%**
UNE Digital Loops DS-1 and Above		
State	**BellSouth**	**CLECs**

[44] *Georgia/Louisiana II* proceeding, CC Docket 02-35, BellSouth *ex parte* filing at 3 (Apr. 17, 2002).

[45] *BellSouth Joint Application* at 100.

[46] Metrics B.2.19.18.1.1 and B.2.19.19.1.1. These are some of the key metrics contained in the Florida SEEM plan. According to BellSouth witness Varner these metrics represent "a measurement of installation quality." *Varner Affidavit* at 111. With the numbers being reported, however, it appears that this metric more appropriately measures installation *inequality*.

Florida	6.4%	**10%**
Tennessee	3.5%	**18.9%**

BellSouth failed to meet the retail analogue for troubles within the first 30 days in Florida for 67% of the submetrics with CLEC activity in Florida in May through July 2002.[47] Similarly, BellSouth missed 4 of the 6 submetrics in Tennessee during that same period.[48] Not surprisingly, BellSouth cites "defective plant facilities" and "CO wiring problems" (*i.e.,* technician error) as two of the three causes for this discriminatory performance. Perhaps most significantly, however, BellSouth admits that in both states "no trends or systemic installation issues were identified for these items" – meaning that no solutions to remedy this deficient performance have been devised or even considered.[49]

Following the initial post-install period, the CLEC loops (assigned by BellSouth) consistently sustain more outages than analogous BellSouth lines. In fact, the CLEC Customer Trouble Report Rate exceeded BellSouth retail in ***every month*** this year for Digital Loops – with the out of parity measure (z-score) reaching -49.[50] On a voice-grade equivalent basis, this out-of-parity trouble rate affected a CLEC customer base of between 156,240 and 4,374,720 lines.[51]

---

47 *BellSouth Joint Application* at 92 & n.64.

48 *Id.*

49 *Id.*

50 *BellSouth Varner Affidavit*, Exhibit PM-33, Florida data. A metric is considered statistically out of parity when the z-score reaches -1.645. For Tennessee, BellSouth did marginally better – missing parity in 26 of the 28 categories.

51 *Id.* Since the category includes all Digital Loops DS-1 and above, the 6,510 circuits represents 156,240 lines if all of those digital loops are DS-1 and 4,374,720 lines if they are DS-3s.

Exacerbating the outage problem, BellSouth fails to repair the line or replace the circuit on the first attempt. This results in a large quantity of repeat troubles – ranging from 14% to 24% repeat troubles in Florida and up to 29% repeat troubles for Tennessee – in the most recent two months.[52] On a voice-grade equivalent basis, the base of CLEC trouble volumes in Florida equaled between 7,872 and 220,416 lines.[53] Clearly, these BellSouth loop troubles are so endemic as to prevent UNE-loop competition.[54]

In sum, BellSouth acts in a discriminatory fashion in making facilities available to CLECs in the first instance. Once BellSouth actually assigns facilities, it assigns second or third grade, trouble-prone circuits. Once assigned, these circuits fail immediately after installation due to inherent weaknesses, inadequate testing, or faulty technician performance. These loops then continue to suffer troubles with greater frequency, month after month. When repairs are finally made, the repair is either not completed properly or the trouble reoccurs due to the poor quality of the circuit. There is simply no way that BellSouth, based on its own performance data, can credibly claim to be in compliance with the checklist standards for loops.[55] BellSouth's performance is utterly inexcusable.

---

52 *Id.*, Percent Repeat Troubles within 30 days, DS-1 and higher loops.

53 *Id.*, including the "Volume" category for DS-1 and higher loops, both dispatch and non-dispatch.

54 KMC believes that its outage problems may be even more severe than the CLEC aggregate numbers indicate, since it generally competes in the Tier III cities that most other companies ignore. Although these cities are apparently also ignored by the BellSouth capital expenditure planners, they are an important component of the Commission's goals of widespread competition and broadband deployment.

55 *See, e.g., New York 271 Order,* 15 FCC Rcd at 4074-75, ¶ 224. The Commission stated that "to compete effectively in the local exchange market, competing carriers must be able to access maintenance and repair functions in a manner that enables them to provide service to their customers at a level of quality that matches the quality of service that Bell Atlantic provides its

. . . .*Continued*

III. CONCLUSION

For the foregoing reasons, KMC respectfully requests that the Commission find that BellSouth has not complied with section 271 and deny the application accordingly.

Respectfully submitted,

/s/

Genevieve Morelli
Andrew M. Klein
Jennifer M. Kashatus
KELLEY DRYE & WARREN LLP
1200 19th Street, N.W.
Washington, D.C. 20036
(202) 955-9600
(202) 955-9792 (facsimile)
Attorneys for KMC Telecom III LLC

Dated: October 10, 2002

own customers." *Id.* at 4073-74, ¶ 222 (*citing Application of BellSouth Corporation for Provision of In-Region, Inter-LATA Services in Louisiana*, 13 FCC Rcd 20599, 20694 (1998) ("*Second BellSouth Louisiana Order"*)).

CERTIFICATE OF SERVICE

I, Alice R. Burruss, hereby certify that on this 10th day of October, 2002, copies of the foregoing were served electronically on the following:

Marlene Dortch, Secretary Federal Communications Commission 445 12th Street, SW Room CY-B402 Washington, D.C. 20554	Janice Myles Wireline Competition Bureau Federal Communications Commission 445 12th Street, SW Room 5-B145 Washington, D.C. 20554
James Davis-Smith U.S. Department of Justice, Antitrust Division Telecommunications Task Force 1401 H Street, NW Suite 8000 Washington, D.C. 20005	Qualex International Portals II 445 12th Street, SW Room CY-B402 Washington, D.C. 20554
Christine Newcomb Wireline Competition Bureau Federal Communications Commission 445 12th Street, SW Washington, D.C. 20554	Luin Fitch U.S. Department of Justice, Antitrust Division Telecommunications Task Force 1401 H Street, NW Suite 8000 Washington, D.C. 20005
Beth E. Keating Florida Public Service Commission 2540 Shumard Oak Blvd. Tallahassee, Florida 32399-0850	Sara Kyle, Chairman Tennessee Regulatory Authority 460 James Robertson Parkway Nashville, Tennessee 37243-0505

/s/
Alice R. Burruss